

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHARLENE BRANDON and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

*Docket No. 98-2581; Submitted on the Record;  
Issued September 7, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss in wage-earning capacity; and (2) whether appellant met her burden of proof in establishing that she sustained a recurrence of disability, due to her November 20, 1981 employment injury, beginning December 17, 1997.

The Office accepted appellant's claim for a low back strain resulting from a November 20, 1981 employment injury while she was working for the employing establishment as a housekeeping aide. Appellant worked intermittently, was transferred to laundry service and in 1985 filed a claim for a recurrence of disability, which was accepted and she received temporary total disability payments since 1985. In 1989 appellant's treating physician restricted her to intermittent work. Appellant had also been working as a minister.

In a report dated March 14, 1997, Dr. Harry H. Bleeker, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed reports of electrodiagnostic studies. He diagnosed chronic low back syndrome with right lower lumbar radiculopathy. Dr. Bleeker opined that appellant could work 8 hours a day but could lift no more than 40 pounds. In a report dated May 17, 1997, Dr. Bleeker stated that appellant could lift no more than 40 pounds occasionally, could lift 25 pounds frequently and up to 20 pounds continuously. He stated that appellant was limited to occasional bending, stooping, squatting, kneeling, climbing and reaching.

By letter dated August 29, 1997, the employing establishment offered appellant the position of a library technician, which was full time and accommodated Dr. Bleeker's 40-pound weight lifting restriction. The job description stated that the work involved in part serving at the circulation desk, handling telephone calls and maintaining daily circulation records. The physical requirements were lifting 0 to 10 pounds on an intermittent basis and performing work at a desk where the incumbent could sit or stand at her discretion and perform some walking.

By letter dated October 16, 1997, the Office informed appellant that the position of library technician was suitable for her work capabilities and was available. The Office provided appellant with 30 days to accept the job offer or provide an explanation within that time period justifying her refusal to accept the job offer.

By letter dated October 27, 1997, appellant accepted the job offer but expressed reservations due to the ongoing back pain she had been experiencing.

By decision dated February 9, 1998, the Office found that the position of library technician fairly and reasonably represented appellant's wage-earning capacity. The Office noted that the employment was effective on December 8, 1997. Further, the Office terminated benefits, finding that appellant's actual wages met or exceeded the wages of the job appellant held when she was injured and, therefore, no loss of wages had occurred.

In a statement dated March 27, 1998, appellant stated that the library work was too strenuous for her that it involved placing books on shelves as well as stooping, bending and reaching. She stated that she must climb ladders and put heavy books on high shelves.

In a medical report dated February 10, 1998, Dr. Leon G. Robb, a Board-certified anesthesiologist, considered appellant's history of injury, performed a physical examination and diagnosed, *inter alia* lumbar disc syndrome with bilateral myeloradiculopathy and glaucoma by history status post surgery. He prescribed further treatment including a lumbar epidural with steroid injection under IV Diazepam sedation.

On April 21, 1998 appellant filed a claim for a recurrence of disability alleging that a recurrence of the March 20, 1981 employment injury occurred on December 17, 1997. Appellant stated that, while she was putting up a book, her back and leg started hurting.

By letter dated May 7, 1998, the Office requested additional information from appellant including evidence that her employment no longer met the restrictions described by her doctor or a narrative report from her doctor explaining how her condition worsened and prevented her from performing her usual work.

Appellant submitted a statement dated May 27, 1998 and a statement from a friend, Flora Henderson, dated May 19, 1998.

In her May 27, 1998 statement, appellant stated that the library work involved carrying books, bending and climbing ladders to reshelve the books. Appellant stated that she was required to sit on hard library chairs without back support to index and sort materials over long periods of time. She stated that the new position aggravated her back "so badly" and caused her "so much pain" that she could not continue to work. Appellant emphasized that she needed to work as she was supporting two grandsons who live with her and would like to work but requires work within her restrictions.

In her May 19, 1998 statement, Ms. Henderson stated that on one occasion when she sought appellant at work, she was told she must walk around to look for her as appellant never stayed in one place long, that, when she found appellant, she was pushing a cart of books and she

saw appellant stepping up on a ladder and appellant told her it was to file the books on the high shelves. Ms. Henderson stated that appellant put her hands on her back, stated it was hurting her and had tears in her eyes. She also stated that appellant had to bend her back to file books on the low shelves.

In a report dated May 29, 1998, Dr. Robb noted that appellant had undergone a lumbar epidurography and an epidural block of “local and steroids” on March 27, 1998. He stated that appellant returned on April 20, 1998, had a resurgence of back pain with an increase of activities but overall had a 50 percent improvement. Dr. Robb stated that appellant would be “most anxious” to return to work if it did not have the strenuous requirements of repetitive motions such as bending, twisting and reaching stacks of books above her head. He opined that she might be a candidate for an endoscopic epidural neurolysis and nerve decompression, which might afford her “significant relief” and he prescribed nonnarcotic medication of talacin.

By decision dated June 25, 1998, the Office denied the claim, stating that the record failed to establish that she suffered a recurrence of disability causally related to the November 20, 1981 employment injury.

The Board finds that the Office properly adjusted appellant’s compensation to reflect her wage-earning capacity in the position of library technician.

Section 8115(a) of the Federal Employees’ Compensation Act provides that the “wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.”<sup>1</sup> The Board has stated “Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure

In the present case, the position of library technician, which the employing establishment offered appellant and which she accepted, as set forth in the job description was within the medical restrictions described by Dr. Bleeker. The physical requirements of the job were intermittent lifting of 0 to 10 pounds and performing work at a desk where the incumbent could sit or stand at her discretion and perform some walking. In his March 14 and May 17, 1997 reports, Dr. Bleeker stated that appellant could lift no more than 40 pounds occasionally, could lift 25 pounds frequently and up to 20 pounds continuously. He stated that appellant was limited to occasional bending, stooping, squatting, kneeling, climbing and reaching. The position became effective on December 8, 1997.

Appellant did not show that her wage-earning capacity should be modified because she did not submit any medical evidence to show that she was unable to perform the requirements of the job. She submitted statements dated March 27 and May 27, 1998 in which she emphasized that the work in the library exceeded her restrictions in that it involved placing books on shelves, at times by climbing a ladder, stooping, bending, reaching and sitting on hard library chairs without back support. The May 19, 1998 statement by appellant’s friend, Ms. Henderson,

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<sup>1</sup> *Monique L. Love*, 48 ECAB 378 (1997).

indicated that she saw appellant at work climbing a ladder and bending to reshelve books and that she complained of back pain and had tears in her eyes. Appellant also submitted medical reports from her treating physician, Dr. Robb, dated February 10 and May 29, 1998 documenting his treatment of her and prescribing further treatment. In neither of these reports, however, did he address whether appellant could perform her specific work requirements. In his May 29, 1998 report, he stated that appellant was “most anxious” to return to work absent the strenuous requirements of repetitive motions such as bending, twisting and reaching stacks of books above her head. He also stated that when appellant returned to work on April 20, 1998, she had a resurgence of back pain with an increase of activities but did not specifically address whether the physical requirements of the job exceeded appellant’s work restrictions.

The Board also finds that appellant failed to establish that she met her burden of proof in establishing that she sustained a recurrence of disability, due to her November 20, 1981 employment injury, beginning December 17, 1997.

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>2</sup> When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty.<sup>3</sup> As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.<sup>4</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>5</sup> An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant’s unsupported belief of causal relation.<sup>6</sup>

In the present case, appellant did not present sufficient evidence to show a change in the nature and extent of her job requirements as library technician or a change in the nature and extent of her back condition. Although appellant stated in her March 27 and May 19, 1998 statements that the work was too strenuous for her and Ms. Henderson’s May 19, 1998 statement corroborated that at least on one occasion, appellant felt back pain when she climbed ladders or bent over to reshelve books, their statements do not establish that appellant’s job requirements changed from the job description. Further, the medical evidence appellant submitted consisting

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<sup>2</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

<sup>3</sup> *George DePasquale*, 39 ECAB 295, 304; *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>4</sup> *Id.*

<sup>5</sup> *See Nicolea Bruso*, 33 ECAB 1138 (1982).

<sup>6</sup> *See William S. Wright*, 45 ECAB 498, 503 (1994).

of Dr. Robb's February 10 and May 29, 1998 reports do not address recurrence of disability occurring on December 17, 1997 and how it resulted from her November 20, 1991 employment injury. In his February 10, 1998 report, Dr. Robb diagnosed, in part, lumbar disc syndrome with bilateral myeloradiculopathy and glaucoma by history status post surgery. In his May 29, 1998 report, Dr. Robb stated that appellant had a resurgence of pain on April 20, 1998 when she returned to work after surgery but overall had a 50 percent improvement. He opined that she might require further treatment consisting of an endoscopic epidural neurolysis and nerve compression. However, in neither report did he address causation. Although the Office informed appellant of the need to submit additional evidence to establish her claim, appellant did not submit the requisite evidence. She, therefore, failed to establish her claim.

The decisions of the Office of Workers' Compensation Programs dated June 25 and February 9, 1998 are hereby affirmed.

Dated, Washington, D.C.  
September 7, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member